No. 22126

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE STATE OF CALIFORNIA, Acting by and through the DEPARTMENT OF WATER RESOURCES,

Appellant,

vs.

THE OROVILLE-WYANDOTTE IRRIGATION DISTRICT, an irrigation district, and the CALIFORNIA PUBLIC UTILITIES COMMISSION, a public commission,

Appellees.

APPELLANT'S REPLY BRIEF

THOMAS C. LYNCH
Attorney General of the State of California

IVER E. SKJEIE
Deputy Attorney General

RICHARD D. MARTLAND
Deputy Attorney General

Room 500, Wells Fargo Bank Building
Fifth Street and Capitol Mall
Sacramento, California 95814
Telephone: 445-8408

Attorneys for Appellant

printed in CALIFORNIA OFFICE OF STATE PRINTING

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

TABLE OF AUTHORITIES CITED—Continued

UNITED STATES CONSTITUTION

STATUTES OF THE UNITED STATES

STATUTES OF CALIFORNIA

No. 22126

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE STATE OF CALIFORNIA, Acting by and through the DEPARTMENT OF WATER RESOURCES,

Appellant,

vs.

THE OROVILLE-WYANDOTTE IRRIGATION DISTRICT, an irrigation district, and the CALIFORNIA PUBLIC UTILITIES COMMISSION, a public commission,

Appellees.

APPELLANT'S REPLY BRIEF

I

STATEMENT OF THE CASE

OWID offers this court, under the guise of a new statement of the case, additional facts concerning the approval of Project 2088 by various state agencies and prior negotiations between DWR and OWID (OWID 2–3). These facts and the conclusions to be drawn from them are subject to dispute. Further, and most significant, they are not relevant to the issue of who has jurisdiction to determine this matter, nor to the propriety of injunctive or declaratory relief.

By recitation of these additional facts OWID endeavors to argue the issue of liability, relying heavily on the theory of estoppel. Unfortunately, the merits of this issue are not before this court for review.

We submit that the facts relevant to the issues raised by this appeal are set forth in DWR's statement of the case and are undisputed.

II

ARGUMENT

A. Summary

OWID and CPUC characterize this dispute as one in the nature of condemnation, request that this court exercise comity, and assert that this action is barred by Section 27 of the Federal Power Act, the Eleventh Amendment of the United States Constitution, and the status of DWR, OWID and CPUC as agencies of the State of California. Further, OWID and CPUC assert that the FPC has no jurisdiction over the issue of liability.

This is not a dispute in the nature of condemnation. This is a dispute over the obligation of an FPC licensee, OWID, to comply with and assume the economic burden of duties, orders, and regulations imposed by the Federal Power Act and the FPC.

This is not a proper case for the exercise of comity. CPUC has no regulatory authority over OWID, and Water Code Sections 11590–11592 do not purport to accord CPUC such broad regulatory authority over

DWR as to justify the exercise of comity under the holding of *Alabama Public Service Commission* v. *Southern Railway Company,* 341 U.S. 341 (1951).

Section 27 of the Federal Power Act is not relevant to this dispute. This dispute does not involve any interference with a water right or raise any issue over the allocation of waters of the South Fork of the Feather River as between Projects 2100 and 2088.

This type of action is not barred by the Eleventh Amendment. *Alabama Public Service Commission* v. *Southern Railway Company* (supra). Neither is it barred because the parties thereto are state agencies. Section 317 of the Federal Power Act does not exempt from its provisions, either expressly or implicitly, disputes between FPC licensees that are public agencies of the same state.

Whether or not the FPC has authority to determine the issue of liability is not relevant to this dispute. Any authority that does exist is, clearly, held either by the FPC, or the District Court under Section 317 of the Federal Power Act, or both. DWR does not ask this court to determine as between the FPC and the District Court which has partial or complete jurisdiction over the issue of liability. DWR asks only that this court declare that CPUC has no jurisdiction over this issue, or any other issue raised by this dispute. DWR requests this court to direct the District Court to stay proceedings on the issue of liability until the authority of the FPC on this issue has been determined by judicial review.

B. This Dispute Is Erroneously Characterized By Appellees As One In The Nature Of Condemnation; It Is Not; It Is A Dispute Over The Obligation Of OWID As An FPC Licensee To Comply With Duties, Orders, And Regulations Imposed By The Federal Power Act And FPC, And The Authority Of CPUC To Vary Such

OWID endeavors to characterize this dispute as one in the nature of condemnation. It states (OWID 19):

> "Clearly, one whose reservoir impairs or destroys another's property would, under general principles of law, be liable to that person. Section 10(c) simply confirms that this liability survives issuance of the license. See *Ford and Son* v. *Little Falls Fibre Co.,* 280 U.S. 369 (1930).
>
> "That is what OWID is concerned with in the CPUC proceedings."

Based on this characterization OWID urges that CPUC has jurisdiction of this dispute, citing as authority condemnation cases involving issues of compensation (OWID 20) and local policy (OWID 33).

Based on this characterization CPUC blandly asserts (CPUC 5):

> ". . . DWR's action is grounded upon the theory that OWID is seeking enforcement of rights and duties arising under the Federal Power Act. Upon the facts, this is clearly erroneous. The action of OWID, in its application to CPUC, is strictly based upon the Sections 11590–11592 of the California Water Code."

If this is a condemnation dispute it is clear that local statutes, such as Water Code Sections 11590–11592 cannot qualify an FPC licensee's right to bring an ordinary condemnation action in a federal district court pursuant to Section 21 of the Federal Power Act, 16 U.S.C. 814. *Beezer* v. *City of Seattle,* 62 Wash. 2d 569, 383 P.2d 895 (1963); reversed, *City of Seattle* v. *Beezer,* 376 U.S. 224 (1964). However, this is not a condemnation dispute. First, it is a dispute over the obligation of an FPC licensee, OWID, to comply with duties, orders, and regulations imposed by the Federal Power Act and the FPC. Second, it is a dispute over the jurisdiction and authority of a state agency, CPUC, to shift the economic burden of these duties, orders, and regulations to another FPC licensee, DWR. Third, it is a dispute over the jurisdiction and authority of CPUC to determine what modifications, if any, are required to make one FPC licensed project compatible with another.

With respect to the first and second points, above, this dispute is analogous to that involved in *Big Horn Power Co.* v. *State,* 23 Wyo. 271, 148 Pac. 1110 (1915) and the related case of *Clarke, et al* v. *Boysen, et al,* 39 F.2d 800 (C.A. 10th 1930). In the *Big Horn* case the defendant (Big Horn) had been granted a license by the state engineer to construct a dam to a specified height. The dam was constructed higher than licensed and as a result interfered with the plans of the Burlington Railroad to construct a railway in the gorge

behind the dam, the very conflict which the height limitation in Big Horn's license was intended to avoid.

The state successfully prosecuted an action to compel Big Horn to modify the dam. The dam was not modified and in *Clarke, et al* v. *Boysen, et al* the Burlington Railroad sought to quiet Burlington's title to the right-of-way for the railway and to compel Clarke and others, owners of interests in the dam constructed by the Big Horn Power Company, to modify the dam.[1]

Burlington prevailed in the lower court. On appeal, counsel for Clarke sought to characterize the decision of the lower court as authorizing condemnation of land devoted to a public use. The court stated (pp. 815–816):

> "The theory of counsel for Clarke is that the land was already devoted to public use and that the Burlington Company could not condemn such land under its power of eminent domain.
>
> * * * * *
>
> "The right-of-way does not impair the use of the lawful portion of the dam structure and the protection of the Burlington Company's rights and interests therein will in no wise impair or interfere with the use of such lawful portion. *The fact that the protection of the rights and interests of the Burlington Company in such right-of-way will interfere with the maintenance of the unlawful portion of the dam structure, in our opinion, is not material.*" (Emphasis added.)

[1] The decision in the *Clarke* case dealt with several appeals dealing with various issues. Our comments are limited to that portion of the decision dealing with cause No. 1513 which is discussed on pages 813–821 of 39 F.2d.

Counsel for Clarke also sought to invalidate the lower court's decision on the theory of estoppel. The court stated (p. 818):

> "Counsel for the Clarke group further contend that the Burlington Company is estopped to complain of such superstructure and narrow spillway as a nuisance, because the dam and superstructure were constructed and completed before the construction of the railway.
>
> "The Burlington Company's predecessor, the Big Horn Railroad Company, filed its application for its right-of-way in March, 1905. When application was made to the state engineer for the approval of a dam 60 feet in height, the Burlington Company protested and the state engineer limited the height of the dam to 35 feet and approved the plans for a dam 35 feet in height with a spillway 125 feet long. *Under these facts, the Burlington Company clearly had the right to construct its railroad on its right-of-way and to rely upon its right to require the dam to be modified to conform to a lawful structure.*" (Emphasis added.)

The *Big Horn* and *Clarke* cases illustrate that the regulation of OWID by the FPC, and the responsibilities of OWID under the Federal Power Act, do not create a condemnation dispute merely because such regulations and responsibilities might enure to the benefit of DWR. In the court's own words (39 F.2d at page 816):

The *Wycoff* case is of course only one of a number of cases in which the federal courts have rejected efforts such as DWR's effort to "rush into federal court to get a declaration which . . . is intended . . . to tie the Commission's hands before it can act . . ." (344 U.S. at p. 247) Even before *Wycoff,* the Supreme Court refused to countenance such attempts to circumvent state administrative proceedings. In *Petroleum Exploration, Inc. v. Public Service Commission,* 304 U.S. 209 (1938), a gas company sought a federal court injunction against proceedings before the Kentucky Public Service Commission to fix the company's rates on the grounds that the proceedings were beyond the Commission's jurisdiction and in violation of the company's constitutional rights. The Court refused to intervene, declaring at pp. 222-23:

> "By the process of injunction the federal courts are asked to stop at the threshold, the effort of the Public Service Commission of Kentucky to investigate matters entrusted to its care by a statute of that Commonwealth obviously within the bounds of state authority in many of its provisions. The preservation of the autonomy of the states is fundamental in our constitutional system. The extraordinary powers of injunction should be employed to interfere with the action of the state or the depositaries of its delegated powers, only when it clearly appears that the weight of convenience is upon the side of the protestant. 'Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state.' "

And the Court has reaffirmed its disapproval of such "end-run" tactics as DWR here seeks to employ subsequent

to *Wycoff*. In *Public Utilities Commission v. United Air Lines,* 346 U.S. 402 (1953), an airline sought federal declaratory relief from regulation by CPUC on the grounds that such regulation was outside the jurisdiction of the Commission and was unconstitutional. The Court, in a *per curiam* decision, summarily reversed a three-judge federal tribunal which had granted the relief, citing its opinion in *Wycoff*. See, also, *Topp-Cola Company v. Coca-Cola Company,* 314 F.2d 124 (2d Cir. 1963), holding at page 126 that an applicant for advantages conferred by local trademark registration laws "may not use a declaratory judgment action in order to remove to a federal court an opposition proceeding before local [administrative] authorities" and *Gill v. Iowa-Illinois Gas and Electric Company,* 233 F.2d 145 (7th Cir. 1956), affirming dismissal of an action by consumers of electricity, supplied by a public utility, for an injunction against regulation of the utility's rates by the Illinois Commerce Commission and for a declaration that such regulation was exclusively within the jurisdiction of the FPC.

DWR's concurrent request for a declaration of exclusive jurisdiction in the FPC under the Federal Power Act (CT 62) is simply another effort to block the CPUC proceedings and without merit for the reasons already discussed. *Gill v. Iowa Gas and Electric Company,* above, is squarely in point and establishes that such a declaration would be improper. In that case the plaintiffs asked for a declaration of exclusive FPC jurisdiction, or, in the court's words, "urge[d] the judiciary to correct alleged administrative under-enforcement at the national level, i.e., Federal Power Commission." (233 F.2d 146) The Court denounced this attempted use of the declaratory judgment procedure "as an ignition switch by which to start the machinery of the federal administrative agency", stating at pp. 146-147:

> "Utilizing a remedy labeled 'declaratory judgment' adds nothing significant to plaintiffs' abortive effort to short circuit procedural and administrative steps intimately connected with the regulation and supervision of the public utility, Iowa-Illinois . . . We think the district judge correctly declined to indirectly coerce or activate the Federal Power Commission or oust the Illinois Commerce Commission."

In Part II of this brief we show that DWR's arguments respecting FPC jurisdiction are mistaken on the merits. But even if one were to accept, for purposes of discussion, DWR's argument that OWID's alleged violations of Section 10 give FPC jurisdiction to the exclusion of CPUC, it is clear that if the FPC fails to find violations (as we think it must), DWR's entire argument collapses. The Court therefore is being asked to prejudge an issue now properly before administrative agencies and to interfere with state administrative proceedings on the strength of a speculative assumption which may shortly be proved wrong. Such action would be a mistake and is moreover unnecessary for the protection of DWR's rights.

2. Declaration Concerning DWR's Right to Bring Future Lawsuits (1.d; 1.e).

As for the requested declaration that DWR has a right to maintain eminent domain proceedings under Section 21 of the Federal Power Act (CT 63) or ejectment proceedings (CT 64), the complete answer was given by this Court in *United States v. Central Stockholders' Corp. of Vallejo,* 52 F.2d 322 (9th Cir. 1931). There the United States had brought suit to determine that the defendant had no right to prevent the United States and its Federal Power Act licensee from constructing certain reservoirs, and no right to be compensated for loss of water occasioned by the impounding of water by the United States and its licensee.

The Court held that those were nonjusticiable abstract questions, and that if the United States wanted to impound the water, its remedy was to do it. See also, *United States v. West Virginia,* 295 U.S. 463 (1935)*

3. Declaration Concerning the Effects of Violation of the Federal Power Act (1.a; 1.c).

At virtually every point in its brief DWR refers to the Federal Power Act, particularly Sections 10(a), 10(b) and 10(c), and argues the asserted effects on its obligations to OWID. Its position seems to be that it has no obligations to OWID because OWID violated these provisions (O.B. 26-27) by misrepresenting the effects of the Reservoir and failing to construct the South Fork Project in a manner approved by FPC. (O.B. pp. 22-24, 35-36) Even if DWR's claim of violation were true (which it is not), no authority is cited for the proposition that DWR can therefore destroy OWID's facilities with impunity, and we know of no such authority.

For reasons which are not disclosed anywhere in its brief, DWR has attached to its brief the initial decision of an FPC examiner. Not being a part of the record, the initial decision manifestly is not properly before the Court. Moreover, it certainly does not demonstrate FPC support for DWR's legal or factual substantive position. It is nothing more than a recommendation to the FPC, which alone can make a decision; exceptions will be filed to this recommendation which will demonstrate its error in many important respects. What the initial decision *does* show vividly is that DWR asked the court below, and now asks this Court, to pre-empt and prejudge complex factual issues presently before administrative tribunals. In short, it underscores the

---

**Central Stockholders* was decided before the Declaratory Judgment Act, *West Virginia* after adoption of the Act.

impropriety of federal court intervention at this juncture, as does DWR's own request here for a *stay* of further proceedings until a final FPC decision has been rendered. (O.B. p. 53)

DWR's substantive contentions, even if valid, are in any event, in the nature of *defenses* to OWID's claim before the CPUC, as is clearly shown by DWR's brief. (O.B. pp. 20, 25, 28, 33 and 36) The existence of defenses arising under federal law does not, however, create an affirmative cause of action for relief:

> "Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. *If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim.* This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Public Service Commission of Utah v. Wycoff Co.,* 344 U.S. 237, 248 (1952), emphasis added; see, also, *Skelly Oil Co. v. Phillips Co.,* 339 U.S. 667, 671-674 (1950); *Bonanza Airlines, Inc. v. Public Service Commission,* 186 F.Supp. 674, 679 (D.Nev. 1960); *Arrow Lakes Dairy, Inc. v. Gill,* 200 F.Supp. 729, 731-732 (D. Conn. 1961).

4. Declaration Concerning the Future Effects of DWR's Reservoir (1.d).

Finally, DWR's request for a declaration that it "will not take or damage any lands or property belonging to [OWID]" (CT 63) is so far beyond the pale as to require no comment.

The federal courts will not—and constitutionally cannot —issue declarations which are abstract or hypothetical, and hence premature. The power to grant declaratory relief is limited to a "concrete case admitting of an immediate and definitive determination of the legal rights of the parties." *Public Service Commission of Utah v. Wycoff Co.,* above, at p. 243. This is not such a case. As has been shown above, the court could not make a blanket declaration of nonliability without regard to what the circumstances may be in which DWR takes or damages OWID's property. It cannot make an abstract declaration of DWR's right to maintain and prevail in other lawsuits, without regard to what facts might be proved in such suits. It certainly cannot declare that DWR's project will not cause injury to OWID's property. The declaratory judgment act gives the court no power to issue predictions of future facts. See 28 U.S.C. § 2201; *United States v. West Virginia,* above; *Fair v. Dekle,* 367 F.2d 377 (5th Cir. 1966), cert. denied, 386 U.S. 996 (1967)

II. Sections 11590-11592 of the Water Code Are Valid and Vest CPUC With Jurisdiction Over Certain Phases of the Dispute Between the Parties

A. DWR'S ARGUMENTS ON THE MERITS OF ITS "FEDERAL LAW CLAIMS" ARE IRRELEVANT AND PREMATURE

The only issue which is properly before this Court is whether the judgment below can be sustained on any ground. See, *Jaffke v. Dunham,* 352 U.S. 280, 281 (1957). We have shown above why it should be sustained on the ground on

which the judgment was rendered. But even if this Court were to reach the merits of DWR's attack on W.C. Sections 11590-11592 and CPUC jurisdiction, the judgment has to be sustained unless, regardless of the facts and *under any construction or application,* Sections 11590-11592 must be struck down and the CPUC held to be without jurisdiction.

As a general proposition, federal courts will not go out of their way to strike down state statutes as invalid. Such action is, and should be, a last resort only. If a statute can be interpreted in a way which will render it valid, it should be given such an interpretation.

> "If an interpretation of a state statute can be reasonably adopted which does not bring the enactment within the inhibition of federal law, that interpretation should prevail against another which would rest upon an assumption that the state legislature intended to enact a law in conflict with the constitution or statutes of the United States." *Rushton v. Schram,* 143 F.2d 554, 559 (6th Cir. 1944); accord, *Associated Press v. National Labor Relations Board,* 301 U.S. 103, 132 (1937).

This principle ought to be of particular force where the attack on the statute is made *before* the factual record has been developed before the administrative agency and the agency has had an opportunity to interpret the statute. (In this connection, see the discussion respecting prematurity, Part I, above). Moreover, DWR's standing to attack the validity of the very statute from which it derives its existence is subject to substantial doubt. See, *Heim v. McCall,* 239 U.S. 175, 190 (1915).

B. DWR'S ARGUMENTS ON THE MERITS ARE ERRONEOUS

In any event, examination of the Federal Power Act and the California Water Code discloses that the former does not intrude into the area of the latter and that there is no

conflict between them, at least so far as this case is concerned. While Sections 10(a), 10(b) and 10(c) of the Act give the FPC power to *require* modifications *before* approval of a project, to *approve* modifications subsequently and to require a licensee to maintain its project, Section 10(c) also provides that

> "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works . . ."*

When FPC issued its license to DWR for the Oroville project, in 1956 and again in 1957, it specifically noted the possibility of damage being caused to OWID's Miners Ranch Canal and gave DWR notice that "the provisions of Section 10(c) of the act make each licensee liable for all damages occasioned to the property of others . . ." (16 FPC at pp. 1340-1341).

The effect of Section 10 (c), and of the proviso in DWR's license, is to preserve such liability as exists under general law and to preclude creation of immunity in a licensee.

Clearly, one whose reservoir impairs or destroys another's property would, under general principles of law, be liable to that person. Section 10(c) simply confirms that this liability survives issuance of the license. See, *Ford & Son v. Little Falls Fibre Co.*, 280 U.S. 369 (1930).

That is what OWID is concerned with in the CPUC proceedings. It is an irrigation district responsible for supplying essential domestic and irrigation water to some 15,000 people and 5,000 acres in Butte County. Its South Fork Project is a part of the California Water Plan, carried out under DWR's aegis. (DWR Bulletin 3, May 1957, p. 108,

*DWR's brief studiously omits any reference to this provision.

plate 5 sheet 6, CT 159) After many years of cooperative and coordinated effort with DWR in the development of the Feather River water resources, it was suddenly faced with a repudiation by DWR of responsibility for the consequences of Oroville Reservoir in May 1966. (CT 75) To protect the interests of the local water users which it serves, the application was then filed with the CPUC to resolve this question of responsibility.

The Federal Power Act does not deal with this kind of problem. It does not provide a remedy. It does not confer jurisdiction on FPC to determine questions of liability for damage done by a licensee, and it does not preclude state tribunals such as CPUC from hearing and determining such questions. The FPC itself has always held that tribunals other than itself possessed jurisdiction to adjudicate liability issues. *Alabama Power Co.,* 58 P.U.R. 3rd 407, 410 (1965); *Idaho Power Co.,* 29 F.P.C. 29 (1963); *Department of Water Resources,* 28 F.P.C. 3, 4 (1962). Since the *Ford* case, above, it has not been questioned that state tribunals have at least concurrent jurisdiction.

State jurisdiction of compensation questions, and the application of state rules to such questions, is certainly not abhorrent to the Act. An unbroken line of authority holds that state laws fixing the amount of money an FPC licensee must pay to those with whose property it interferes are valid and binding upon the licensee. See, *Feltz v. Central Nebraska Public Power & Irrigation District,* 124 F.2d 578 (8th Cir. 1942) (state law determines the amount of consequential damages licensee must pay upon taking property); *United States v. Central Stockholders' Corp. of Vallejo,* 52 F.2d 322 (9th Cir. 1931) (licensee must pay riparians damage caused by its diverting water because state law so provides); *Ford & Son v. Little Falls Fibre Co.,* 280 U.S.

369 (1930) (same); *Central Nebraska Public Power & Irrigation District v. Fairchild,* 126 F.2d 302 (8th Cir. 1942) (state law determines the amount of interest payable by licensee upon taking property, even though it imposes greater burdens on licensee than general law respecting interest).*

Indeed, Section 21 of the Act specifically contemplates that the amount payable by a licensee for property taken or destroyed may be fixed in the first instance by contract —which would be governed by state law. It further provides that even in the event of a taking by eminent domain, a condemnation action may be brought in the state court and, even if it is not brought there, the practice and procedure shall conform as nearly as possible with that in the state courts. 16 U.S.C. § 814. With respect to the liability of a licensee to provide substitute or relocated facilities for those which it takes or destroys, the Act leaves that subject untouched. See, *Feltz v. Central Nebraska Public Power & Irrigation District,* above, at p. 582.

There is, therefore no reason to assume that Congress meant to preclude anyone injured by a licensee's activities from recovering damages by action in a state tribunal. There is also no reason to suppose that Congress meant to single out damaged licensees and deprive them alone of the right enjoyed by others to recover for the damages done to them by other licensees. And there is certainly no reason to assume that Congress meant to oust state utilities commissions from jurisdiction, particularly where the question of liability transcends a private dispute and is between two state agencies responsible for the protection of the important public interest in an uninterrupted water supply.

---

*See also *Broad River Power Co. v. Query,* 288 U.S. 178 (1933), which provides that a state may tax the production of power by an FPC licensee.

That conclusion is not changed by the fact that W.C. Sections 11590-11592 contemplate the provision of substitute facilities—this being the measure of damages under general law in the type of cases covered by Section 11590. See, *e.g., State of Washington v. United States,* 214 F.2d 33, 39 (9th Cir. 1954), cert. den. 348 U.S. 862 (1954).

DWR argues, however, that provision of substitute facilities may involve modification of licensed project works. If it does, it is of course subject to prior approval of FPC. This is the position consistently taken by OWID (CT 167-168) and accepted by CPUC. (CT 282) It was also the thrust of this Court's order of September 11, 1967, denying DWR's motion for a restraining order as unnecessary. But Section 10(b) only provides that FPC approval must be obtained before substantial modifications are made. It does not give FPC, as DWR argues, exclusive jurisdiction to "require" modifications now (O.B. p. 36), much less to adjudicate liability.* It certainly does not prohibit another tribunal from awarding damages which may involve the making of modifications, so long as FPC approval is obtained before they are made. And it certainly does not clothe DWR in immunity for damage it may do (as it contends here) or prohibit other tribunals from allocating liability for the adverse consequences of a licensee's activities, particularly where the allocation is between two state agencies. In other words, even assuming that the Act imposes some limitations on CPUC jurisdiction, it cannot be said that CPUC is *totally* lacking in any jurisdiction what-

*In fact, the FPC's jurisdiction is circumscribed by the Act which prohibits it from altering outstanding licenses without the licensee's consent (Sec. 6) and authorizes it to require modification of project works only before the project has been approved. (Sec. 10(a))

ever touching the problem and accordingly the requested relief, which would oust it completely, was properly denied.

DWR's only authority is *First Iowa Hydro-Electric Cooperative v. FPC,* 328 U.S. 152 (1946), said to establish FPC's "comprehensive and exclusive jurisdiction . . . over the planning, financing and construction of projects . . ." (O.B. p. 33) But that case only held that Section 9 (b) of the Act, requiring an applicant to submit with its application to the FPC satisfactory evidence of compliance with state law, did *not* require FPC to refuse issuance of a license until the applicant had obtained a state permit for the project as required by state law in that case. That the Court was concerned solely with the validity of state laws which give state officials a veto power over federally licensed projects is abundantly clear from the opinion:

> "To require the petitioner to secure the actual grant to it of a state permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa *a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act.* It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government. * * * In the Federal Power Act there is a *separation of those subjects which remain under the jurisdiction of the States* from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the *division of the common enterprise between two cooperating agencies of government, each with final authority in its own juris-*

diction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. * * * A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable." (328 U.S. 152 at pp. 164, 167-168, emphasis added.)

Sections 11590-11592 do not, of course, give state officials a veto power over DWR's project and are not intended to do so. They do not interfere with the carrying out of a federally licensed project, and no relief threatening such interference is sought under them. The CPUC has construed them as not conflicting with the Federal Act. See, *Feather River Railway Co.,* 61 P.U.C. 728 (1963), writ of review denied, August 12, 1964; *County of Butte,* 62 P.U.C. 537 (1964), writ of review denied, March 1965. DWR asks this Court, contrary to precedent and common sense, to assume that conflicting orders are likely to be issued, although such orders are neither sought nor necessary. *Rushton v. Schram,* 143 F.2d 554 (6th Cir. 1944); *Erlich v. Municipal Court,* 360 P.2d 334, 55 C.2d 553, 558 (1961); *Hughes v. City of Lincoln,* 43 Cal. Rptr. 306, 232 C.A.2d 741, 749 (1965).

The *First Iowa* case recognizes the existence of a dual system of control under the Act, leaving certain subjects to control by the states. (See pp. 20-21, above) One of those subjects in which state law has traditionally controlled, as pointed out above, is the determination of liability for damage done by a licensee to the property of others. DWR's brief will be read in vain for any demonstration why it follows that the existence of FPC jurisdiction under Sections 10(a), 10(b) or 10(c) compels the conclusion that no

valid CPUC order can be made in this case.* Quite the contrary, a reading of these statutes and the cases demonstrates that this is one of those common situations where federal and state jurisdiction can and should be accommodated. Certainly the Court should be slow to impute to Congress an intention to prevent the exercise of state power in a matter of serious public concern where no authority is given to the federal agency to meet the need, *i.e.,* allocating the burden of damage caused by DWR's project. *Atchison, T. & S. F. Ry. Co. v. Railroad Commission,* 283 U.S. 380, 391 (1931) (where the state commission ordered relocation of rail lines subject to the necessary approval of the Interstate Commerce Commission, showing that, DWR's argument notwithstanding, conflict between state and federal orders is not inevitable).

III. DWR Is Not Entitled to Injunctive Relief.

All that has been said to this point applies equally to refute DWR's claim to injunctive relief; that claim is made prematurely (Part I) and is substantively without merit (Part II). The claim appears to be based on the contention that there is a

> "potential source of conflict that could result from independent decisions of the FPC and CPUC." (O.B. p. 44)†

It is self-evident that this is not a sufficient ground to enjoin the operation of a state statute and the proceedings

---

*The most DWR seems to say is that there is a "potential source of conflict that could result from independent decisions of the FPC and CPUC". (O.B. p. 44) This argument demonstrates that the action is premature and it is certainly insufficient to strike down a state statute. (See Parts I and III) Moreover, as pointed out above, DWR's argument assumes that OWID modified its Canal and constructed it without FPC approval (O.B. pp. 36, 38), and these facts are disputed and for the administrative agencies to determine.

†Compare the ground urged by DWR in support of its requests for an injunction below, namely, that the federal act supersedes and preempts Sections 11590-11592. (CT 354, 495)

of a state agency, even if the arguments of Parts I and II, above, were ignored.

To begin with, the claim is wholly lacking in equity because DWR has not shown "any threatened or probable act of the [appellees] which might cause the irreparable injury essential to equitable relief by injunction." *Public Service Commission of Utah v. Wycoff Co.,* above at p. 241.

Neither OWID nor CPUC has threatened, or contemplates, any action whatever that might in any way interfere with DWR's project. OWID is merely pursuing its remedy to secure relief for the damage with which its project is threatened by DWR. It does not oppose any taking or other action connected with DWR's project. The CPUC has taken the same position in this proceeding. (CT 112) Hence there is not even an issue or controversy, let alone threatened injury, respecting DWR's right to carry out its project and to take whatever property or action it needs for the purpose. There is, therefore, no threat of irreparable injury to DWR, much less an imminent one, and no right to an injunction.*

United States v. West Virginia, 295 U.S. 463 (1935) so holds. In that case, the United States brought suit to enjoin a state from asserting that its right to license a particular power project was superior to the United States' right to do so, and for a declaration that the United States' right was in fact superior. There was "no allegation of any interference by the State, actual or threatened, with any of the land or property" the United States had acquired

*It has long been settled that the expense and inconvenience of litigation are not the kinds of irreparable harm against which equity protects. *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 51-52 (1938). See, also, *Macauley v. Waterman Steamship Corp.,* 327 U.S. 540, 544-545 (1946), to the effect that questions of statutory coverage are not to be decided by injunction suits when the administrative process "had hardly begun."

for the project. (p. 471) The Supreme Court denied relief, and, further, held that those facts did not state a justiciable case or controversy. See also *New York v. Illinois and Sanitary District of Chicago,* 274 U.S. 488 (1927) (no right to enjoin diversion of water absent a showing that existing project will be affected by it).

Moreover, DWR's remedies in pending proceedings before PUC and FPC are adequate. DWR has asserted its defenses there and, if necessary, can appeal any adverse final orders.

> "The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right." *Public Service Commission of Utah v. Wycoff Co.,* supra, pp. 247-248.

DWR's appeal for injunctive relief, based on the opposite premise (O.B. p. 41-42), is therefore groundless. See also, *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293 (1943); *Toomer v. Witsell,* 334 U.S. 385 (1948).

The cases DWR cites to support its claim for injunction do not help it in the slightest and demonstrate the lack of equity of its case. (O.B. pp. 45-47)

In *Chicago v. Atchison, T. & S. F. Ry. Co.,* 357 U.S. 77 (1958), the interstate railroads had engaged a motor carrier to transfer their interstate passengers and baggage between railroad stations in Chicago. The City then adopted an ordinance prohibiting the carrier from operating unless it first obtained a city certificate and approval of the City Council. When the carrier refused to do so, the City threatened to *arrest and fine its drivers for operating*

without a certificate. The Court held that the movement of passengers and baggage between these stations was interstate commerce, that the city ordinance was invalid insofar as it prohibited such transfers without a city certificate and that the carrier was entitled to relief against the city's enforcement efforts by threats of arrests and fines.

Cloverleaf Co. v. Patterson, 315 U.S. 148 (1942), held that an injunction would lie against state officials who on sixteen occasions entered plaintiff's plant and under state pure food laws *seized twenty thousand pounds of packing stock butter* from which plaintiff manufactured renovated butter, jeopardizing plaintiff's ability to continue in business. Plaintiff held the stock for manufacture into renovated butter to be shipped in interstate commerce. The Court held that since federal legislation covered the production of this product for shipment in interstate commerce, state officials could not confiscate a product which met Federal requirements and thereby interfere with, indeed prohibit, interstate commerce.

In *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947), proceedings were brought before the Illinois Commerce Commission to regulate warehousemen under the state regulatory law. The Court found that certain phases of that regulation, including rate regulation and licensing requirements, were covered by the federal act and that Congress in these respects had unequivocally provided federal regulation to be exclusive. It specifically distinguished instances of dual control by state and federal authorities, citing the *First Iowa* case, above. Other phases of the state regulatory scheme were not covered by the federal act. As to these the court said:

> "Any such objections are at this stage premature. Congress has not foreclosed state action by adopting a

policy of its own on these matters. Into these fields it has not moved. By nothing that it has done has it pre-empted those areas. And see *Federal Compress Co. v. McLean, supra,* p. 23. In more ambiguous situations than this we have refused to hold that state regulation was superseded by a federal law." (331 U.S. 218 at p. 237)

These cases hold that only when there is a *direct, explicit and immediate conflict* in the exercise of state and federal power, resulting in immediate interference with federally protected activities or violation of the congressional mandate, will the federal court enjoin state action. Nothing of the sort exists in this case. All CPUC is undertaking is to allocate responsibility for damage as between state agencies, subject to whatever federal approvals may be required subsequently (essentially a matter of determining which pocket of the state is to pay for consequences of a reservoir). There is no threat of interference with federally authorized activities or even of curtailing any of DWR's rights or remedies.

In the court below DWR relied also on the companion case to *Rice,* above, *Rice v. Board of Trade of the City of Chicago,* 331 U.S. 247 (1947). This time it fails to cite it although it is most instructive in determining the reach of the foregoing cases. In that case, the Court upheld a denial of injunctive relief against enforcement by the Illinois Commerce Commission of state laws applicable to the Board of Trade. After noting that the federal Commodity Exchange Act contains no declaration ousting state jurisdiction, it held (unanimously):

> *"Respondents' claim of supersedure is, therefore, premature.* Until it is known what rules the Illinois Commission will approve or adopt, it cannot be known whether there will be any conflict with the federal law.

> *Any claim of supersedure can be preserved in the state proceedings. And the question of supersedure can be determined in light of the impact of a specific order of the state agency on the Federal Act* or the regulations of the Secretary thereunder. Only if that procedure is followed can there be preserved intact the whole state domain which in actuality functions harmoniously with the federal system. For even action which seems pregnant with possibilities of conflict may, as consummated, be wholly barren of it." (331 U.S. 247 at pp. 255-256; emphasis added)

That statement controls here. Moreover, the granting of injunctive relief lies in the discretion of the trial court and in these circumstances it cannot be said that this discretion was not properly exercised. See, *Yakus v. United States,* 321 U.S. 414, 440 (1944); *United States v. W. T. Grant Co.,* 345 U.S. 629, 634-636 (1953); *Rice & Adams Corp. v. Lathrop,* 278 U.S. 509, 514 (1929). And contrary to DWR's assertion (O.B. p. 49) and unlike *Stein v. Oshinsky,* 348 F.2d 999 (2nd Cir. 1965), cert. denied 382 U.S. 957 (1965) on which DWR relies, DWR's claim for injunctive relief *does* rest on disputed facts (see pp. 15, 25, above) which OWID has had no opportunity to meet, and it cannot therefore be adjudicted here as DWR requests. (O.B. pp. 49, 53)

IV. Comity Requires That the Judgment Below Be Sustained.

There are additional considerations supporting the judgment below. It is settled law that in the absence of compelling circumstances, the federal courts will not interfere with pending state administrative proceedings.* *Alabama Public Service Commission v. Southern Ry. Co.,* 341 U.S. 341 (1951):

*Comity is to be distinguished from abstention referred to by DWR in its brief here and below, which rests on different principles.

"As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is *convinced that the asserted federal right cannot be preserved* except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that '[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts." (Pp. 349-350, citations omitted, emphasis added)

Alabama Public Service Commission was followed in *Martin v. Creasy,* 360 U.S. 219 (1959); *Florida R.R. and Public Utilities Commission v. Atlantic Coast Line R.R. Co.,* 342 U.S. 844 (1951) (Memorandum decision), and *Atlantic Coast Line R.R. Co. v. City of St. Petersburg,* 242 F.2d 613 (5th Cir. 1957). See also *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 298 (1943).

If noninterference is the prevailing principle in the usual case, this is the *a fortiori* case for its application for, notwithstanding the presence of federal issues, the meat of it clearly involves local questions: how best to ensure a continuing water supply to local users, and which of two State agencies ought to pay to provide or relocate the needed facilities. (See pp. 1-3, 19-20, above)

The question of how to supply the local water users is in fact classically a local one. *Trenton v. New Jersey,* 262 U.S.

182, 185 (1923) (state has power and duty to control and conserve its water resources for the benefit of all its inhabitants). Section 28 of the Act reaffirms the local nature of this matter by declaring that "Nothing contained in this chapter [§§ 791a-793, 795-797, 798-818, and 820-825r of this title] shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."*

For that reason alone this Court should not interfere or direct the lower court to interfere with the local agency's attempt to resolve it. In *Alabama Public Service Commission v. Southern Ry. Co.,* above, for example, the Supreme Court held that a federal court should not take jurisdiction to enjoin a State Public Utilities Commission from enforcing an order prohibiting the abandonment of intrastate tracks, emphasizing that this involved the "essentially local problem" of balancing the cost to the railroad against the public need in local towns. Similarly, in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), the Supreme Court held that a

*In addition, special circumstances exist in this case which make it particularly appropriate for the court to let the CPUC determine the application. OWID is the successor of two public utility water companies (South Federal Land and Water Company and Palermo Land and Water Company). When it acquired the systems of these companies, the CPUC issued orders requiring it to continue to serve water users in their former service areas, and these orders were upheld by the California Supreme Court. *Henderson v. Oroville-Wyandotte Irrigation District,* 277 Pac. 487, 207 Cal. 215 (1929); *Henderson v. Oroville-Wyandotte Irrigation District,* 2 P.2d 803, 213 Cal. 514 (1931); *Rutherford v. Oroville-Wyandotte Irrigation District,* 8 P.2d 836, 215 Cal. 124 (1932), cert. denied 287 U.S. 609 (1932). DWR's overall plan for development of the area's water resources contemplated that a substantial portion of the area would be served by OWID through Miners Ranch Canal. (CT 159) Impairment or destruction of the Canal would make it impossible for OWID to comply with the service requirements of CPUC's orders. Thus it is most appropriate for CPUC to continue to concern itself with this matter.

ederal court should not take jurisdiction to enjoin enforcement of a Commission's order granting a right to drill oil vells in Texas, because the oil industry was of great mportance to the local economy. See also, *Hawks v. Hamill,* 88 U.S. 52 (1933).

The issue between DWR and OWID is even more narowly local than that respecting distribution of water, intrastate transportation, or Texas oil wells. The issue is imply which of these two state agencies should bear responsibility for damage to OWID's facilities caused by)WR. State agencies are merely creatures of the state, nd the state can take money from them, or tax them, vithout any inhibition by federal law. See *Trenton v. Vew Jersey, above; Pawhuska v. Pawhuska Oil & Gas Co.,* 250 U.S. 394 (1919); *Hunter v. Pittsburgh,* 207 U.S. 61 (1907); *City of Coronado v. San Diego Unified Port District,* 227 C.A.2d 455, 477-478 (1964) appeal dismissed, 80 U.S. 125 (1965); *Cranford Co. v. City of New York,* 8 F.2d 52 (2d Cir. 1930). Indeed, state agencies hold heir property for the benefit of all the people of the state, nd, therefore, the question of who pays for the relocation r replacement of such property is a matter of local bookeeping. *Fletcher v. Mapes,* 62 F.Supp. 351, 353 (N.D. Cal. 945); *County of Marin v. Superior Court,* 53 C.2d 633, 638-39 (1960); *Reclamation District v. Superior Court,* 171 Cal. 672, 680 (1916).

Federal courts will not even adjudicate interagency disputes between federal agencies. *United States v. Easement and Right of Way,* 204 F.Supp. 837 (E.D. Tenn. 1962). That vas an action brought by the TVA to condemn interests n land, including a security interest held by the FHA. The court dismissed the action, holding that the plaintiff and he defendant were the same person, i.e., the United States,

and that the settlement of interagency problems of the United States Government was not a judicial function. See, also, *The Pietro Campanella,* 47 F.Supp. 374, 378-379 (D. Md. 1942), holding that the federal Alien Property Custodian could not be substituted for the Italian owners of two Italian cargo ships in wartime forfeiture proceedings brought by the United States because, *inter alia*:

> "... the situation thus created would make a case impossible for the court to adjudicate. The plaintiff is the United States, and the defendant claimant would be an officer of the United States acting for, on behalf of and in the interest of the United States. Obviously there would be no adverse interests here involved and any adjudication made by the court between these two parties would be a nullity." (47 F.Supp. 379)

A fortiori, federal courts cannot (and should not) adjudicate disputes between state agencies, particularly when such an adjudication would foreclose the procedure established by the state legislature for resolving such disputes. See, *People v. Sanitary District of Chicago,* 71 N.E. 334 (Ill. 1904), holding that the State of Illinois was not a necessary or proper party to a condemnation proceeding brought by its agency, the sanitary district, because, among other reasons:

> "... It would be anomalous that the state, which, through its agent, the sanitary canal, desires to devote certain state property to a public use, should by its agent bring a suit in a state court against itself to determine its own compensation for its own land, devoted to its own use. In the absence of express authority for such proceeding—and none exists—it would be a mere nullity, and would be as valid without as with parties thereto." (71 N.E. 335)

In fact, a federal court will not exercise jurisdiction to control the internal affairs of a *private* state-created corpora-

tion. Certainly, it should not when the corporation is not only state-created but also is *public* and an agent of the state. See *Pennsylvania v. Williams,* 294 U.S. 176 (1935):

> "It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state." (294 U.S. 185)

Squarely in point is the unreported decision of the court below in *State of California v. Certain Designated Roads in Butte County, et al.,* No. 8744 (N.D. Calif. 1964) (CT 222-224).* That was another action brought by DWR to avoid its obligations under Section 11590, in that case to replace county roads. That action, like this one, was in the court's words, "the outgrowth of a dispute between a state and a political agency of the State, concerning property held in trust by the agency for the State pursuant to State law, which prescribes a procedure for settling the dispute. See Calif. Water Code §§ 11590 and 11592." The court refused to resolve that interagency dispute and dismissed the action. The same result is called for in this case.

The present dispute is essentially over which pocket of the state will have to pay for damage done by DWR's activities, and that is a proper subject of concern for the state legislature. In Sections 11590-11592 it has dealt with it. Under settled principles of law, this Court should not interfere with the provisions so made by the legislature for dealing with the state's internal problems.

---

*That decision is still good law, notwithstanding the fact that DWR apparently settled that case and obtained a stipulated order from the Court of Appeals dismissing the case as moot. (CT 317)

V. DWR's Procedural Objections Are Without Merit.

DWR contends that the trial court's opinion was faulty because it failed to make findings which would make clear that DWR could assert its Federal Power Act "claims"—more properly defenses (supra, p. 16) — before there is damage to the Canal (O.B. pp. 17, 51). Since the judgment appealed from granted appellees' motions to dismiss made under Rule 12 of the Federal Rules of Civil Procedure (CT 491-492), no findings of fact at all were required to be made. See, Rule 52(a). In any case, a fair reading of the decision shows that it was based on a broad appreciation of the limits of federal judicial power, as reflected in the *Wycoff* case, and was not confined to holding that the absence of physical damage alone precluded relief. (Cf. O.B. pp. 17, 21)

Moreover, the District Court went out of its way to set at rest the concerns voiced by DWR on this appeal by stating "that the dismissal of this case is predicated exclusively on the ground that the action has been brought prematurely. Nothing said in this memorandum and order is ever to be construed as in any fashion passing upon the right of any appropriate party in the proper forum to seek relief and/or recover damages—should the situation which [DWR] now asserts may happen, does in fact at some time in the future happen." (CT 445-446)

It is clear therefore that the judgment would not preclude DWR from bringing an action based on a different state of facts—and, inevitably, any state of facts in an action hereafter filed will be different from that alleged in the instant action.

This is all the protection DWR can reasonably ask from this Court or the court below.

CONCLUSION

For the reasons stated, the judgment should be affirmed.

Dated April 19, 1968.

Respectfully submitted,

WILLIAM W SCHWARZER
DAVID M. HEILBRON
J. THOMAS ROSCH
MCCUTCHEN, DOYLE, BROWN & ENERSEN

Attorneys for Appellee
Oroville-Wyandotte
Irrigation District

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM W SCHWARZER

V. DWR's Procedural Objections Are Without Merit.

DWR contends that the trial court's opinion was faulty because it failed to make findings which would make clear that DWR could assert its Federal Power Act "claims"—more properly defenses (supra, p. 16) — before there is damage to the Canal (O.B. pp. 17, 51). Since the judgment appealed from granted appellees' motions to dismiss made under Rule 12 of the Federal Rules of Civil Procedure (CT 491-492), no findings of fact at all were required to be made. See, Rule 52(a). In any case, a fair reading of the decision shows that it was based on a broad appreciation of the limits of federal judicial power, as reflected in the *Wycoff* case, and was not confined to holding that the absence of physical damage alone precluded relief. (Cf. O.B. pp. 17, 21)

Moreover, the District Court went out of its way to set at rest the concerns voiced by DWR on this appeal by stating "that the dismissal of this case is predicated exclusively on the ground that the action has been brought prematurely. Nothing said in this memorandum and order is ever to be construed as in any fashion passing upon the right of any appropriate party in the proper forum to seek relief and/or recover damages—should the situation which [DWR] now asserts may happen, does in fact at some time in the future happen." (CT 445-446)

It is clear therefore that the judgment would not preclude DWR from bringing an action based on a different state of facts—and, inevitably, any state of facts in an action hereafter filed will be different from that alleged in the instant action.

This is all the protection DWR can reasonably ask from this Court or the court below.

CONCLUSION

For the reasons stated, the judgment should be affirmed.

Dated April 19, 1968.

Respectfully submitted,

WILLIAM W SCHWARZER
DAVID M. HEILBRON
J. THOMAS ROSCH
McCUTCHEN, DOYLE, BROWN & ENERSEN

Attorneys for Appellee
Oroville-Wyandotte
Irrigation District

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM W SCHWARZER